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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-408

VINCENT MALAVARCO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER VINCENT MALAVARCO

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On page 7 of the respondent's brief reliance is placed upon *United States* v. *Geaney,* 417 F. 2d 1116 (U.S.C.A. 2d Circuit) and *United States* v. *Calabro,* 449 F. 2d 885 (U.S. C.A. 2d Circuit) for the proposition that the threshold test for admission into evidence of hearsay testimony is the existence of independent proof of complicity sufficient to meet the "fair preponderance" test. Both cases hold that for submission of the case to the jury, there must be a greater measure of proof than the one applicable to admissibility. How much greater is not made clear. It is now made abundantly clear in the late Second Circuit case

of *United States* v. *Taylor,* 464 F. 2d 240 (Argued June 7, 1972; decided July 6, 1972).

In *Taylor* the Court rejected the rule of the Second Circuit which had prevailed there since the decision of *United States* v. *Feinberg,* 140 F. 2d 592, cert. den. 322 U. S. 726. The rule of *Feinberg* was that the standard of evidence necessary for the judge to send a case to the jury is the same for both civil and criminal cases, to wit, a fair preponderance of the evidence. In *Taylor* the Court of Appeals for the Second Circuit finally laid to rest the *Feinberg* rule, and held that in the Second Circuit, as elsewhere, in a criminal case there must be proof of guilt beyond a reasonable doubt before a case can be given to the jury.

Petitioner complains not only of errors relating to admissibility, but of the error of failing to dismiss the indictment, and of submitting the case to the jury. The opinion of the Court of Appeals held that the evidence of Malavarco's membership in the conspiracy is "not overwhelming". The brief of the respondent on this petition urges only that there is proof by a "fair preponderance". No one urges that there is proof of Malavarco's complicity in the conspiracy is proven beyond a reasonable doubt. The rule which now exists in the Second Circuit under *Taylor* requires that Malavarco's guilt be proven beyond a reasonable doubt. It has been seen that it is not shown that Malavarco performed one act or uttered one word in furtherance of the conspiracy. The only conceivable pathway, then, to a finding of guilt, is proof that Malavarco joined or became a member of the conspiracy. That proof must lie in the independent evidence (non-hearsay). As this Court held in *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680 "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence".

The Court of Appeals did not find, and the respondent does not maintain here, that there is independent evidence of Malavarco's membership in the conspiracy which satisfies the test of "beyond a reasonable doubt".

CONCLUSION

The Petition should be granted to petitioner Malavarco (No. 72-408).

Respectfully submitted,

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